APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 16
HCA/2019/187/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

SYEDA SOKINA BEGUM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie QC, Connor; Faculty Appeals Unit (for David E Sutherland & Co, Aberdeen)
Respondent: Richardson QC AD; the Crown Agent

16 April 2020

[1] On 1 March 2019, at the High Court in Aberdeen, the appellant was convicted of a charge which libelled that:

> "on 1 January 2017 at… you… did assault [GN], born … 2016… and did shake her by the body to her severe injury and the danger of her life".

On 9 April 2019 she was sentenced to 3 years imprisonment.

[2] On 15 July 2019, the appellant lodged a Note of Appeal containing 16 separate grounds of appeal and an omnibus seventeenth ground. On 2 September, leave to appeal was refused at first sift. On 14 November, leave was granted in respect of three grounds (1, 2 and 4). An application to reintroduce seven of the remaining grounds was, with one exception (ground (3)), refused (see Statement of Reasons HCA/2019/187/XC).

[3] The case is a distressing one involving the shaking of a baby in a manner which caused her life threatening injuries. Fortunately, the baby has made a remarkable recovery. She was discharged home within three weeks of her hospital admission. The legal issues which remain are encompassed in the four interlinked grounds of appeal. Three of these concern the adequacy of the trial judge's directions on expert evidence. It is contended, first, that the judge failed to set out what the expert evidence was and what the jury had to accept to convict the appellant. The jury ought to have been reminded that: "today's scientific orthodoxy may become tomorrow's outdated learning"; and therefore the evidence required to be assessed with "special care". Secondly, the jury should have been directed that the Crown required to exclude not only any natural explanation for the injuries but also any realistic possibility of an unknown cause. Thirdly, the jury ought to have been directed that the Crown required to exclude the possibility that someone else had assaulted the baby, before she had come into the care of the appellant. It is said that there was evidence that the baby: had not been well prior to being handed over to the appellant; had not behaved normally when in her care; and had been handled inappropriately by her older sister in the period prior to being handed over. The final ground is that the judge erred in repelling a defence objection to copies of two expert reports being given to the jury and, after they had been ingathered, copies of one being given back to them. The reports were said to contain inadmissible hearsay. They did not reflect the testimony given at trial. When giving their

evidence, the experts had provided further explanations and made qualifications and concessions to what was in their reports.

The Evidence in Summary

[4] GN, who was about 8 months old at the material time, is the daughter of KN and his wife YL. They have an older daughter, who was aged 8. KN and YL operated a takeaway shop. Carole Leung, aged 34, worked in the shop. She introduced YL to the appellant. The appellant was to babysit GN at her own flat on 1 January 2017. She called at the shop at about 3.30pm to pick up the baby. She was due to return her at about 9.00pm. At 9.05pm, the appellant sent Ms Leung a text stating that her (the appellant's) own daughter had fallen asleep and asking if she could return the baby later. Ms Leung phoned the appellant, who was shouting and screaming that the baby was struggling to breathe. KN, YL and Ms Leung all went to the appellant's house. The appellant was standing at the stair door. She was holding the baby and saying that she did not know what to do with her. The baby was floppy and struggling to breathe.

[5] An ambulance was called. When the baby arrived at the hospital at 10.30pm, she was in a critically ill state. She was having seizures. She had subarachnoid, subdural and extensive bilateral haemorrhages and an hypoxic-ischaemic injury to her brain. At the trial, there was a joint report, from a consultant and an associate specialist in child protection and consultants in radiology and ophthalmology, dated 1-20 February 2017. The report, to which two of the doctors testified, recorded a history from the baby's mother, YL, that the baby had been "well throughout the day… and was feeding normally". She had been playing on a mat after a bottle feed. The appellant had left the room for about 10 seconds. When she returned, the baby was floppy, blue and appeared not to be breathing. The

ambulance staff had given the baby diazepam because she was "rigid". There were no visible signs of trauma. There had been no concerning signs in the baby's history.

[6] The doctors concluded that the combination of unexplained collapse, intracranial haemorrhage and bilateral retinal haemorrhages was "highly suspicious of non-accidental injury". The presence of apnoea, seizures and a retinal haemorrhage was "highly predictive of abusive head trauma". Although accurate timing was not possible, it was likely that the injuries had "occurred sometime after she was last seen objectively to be completely well". The injuries were potentially life threatening and life altering.

[7] The appellant was interviewed by the police on 5 January 2017. In a passage quoted by the trial judge in his charge to the jury, she said:

> "It was about 10 minutes after she had taken her bottle. [G] was on my knee and I was throwing her up in the air and catching her. She was fine. I did this about three, four, five times. [G] was laughing. When I caught her, I tickled her tummy with my nose. [G] was laughing. This is normal play that I would have with {G]."

She had said that the baby had been fine when she had picked her up at 3.30pm, apart from having cold feet and hands.

[8] Unfortunately, much of the non-medical evidence is not covered by the judge in his report. What follows is gleaned either from the appellant's or the Crown's narrative in their speeches and the appeal papers. According to the appellant, the baby's father, KN, who like his wife had given evidence with the assistance of an interpreter, gave conflicting accounts of the events on the morning of 1 January, when he had the primary care role, and in the period prior to the appellant picking up the baby. He frequently responded to questions by saying that he could not remember. When referred to his statement to the police, he said that the baby normally woke between 8.00 and 10.00am. She would generally drink a 150ml bottle of milk and sleep every four hours. He could not remember if the baby had finished

the bottle, which he had given to her at 4.00am, or if he had told his wife that the baby had vomited in the course of the morning. He thought that, on 1 January, the baby had slept until 11.00am, which was not normal. He had left to go to the shop at 12.00 noon. In the Crown speech, the advocate depute referred to KN saying, in terms of his police statement, that, when the child had been brought to the shop at about 2.00pm, she had appeared normal and healthy (or happy). She had not been unwell in the first seven months of her life. She could not sit up unassisted because she was "quite a lazy natured baby".

[9] The baby's mother, YL, according to the appellant, had said that she could not remember in response to many questions. Her evidence was inconsistent and contradictory at times. She did say that the baby could sit up unassisted by December 2016. The baby normally slept for an hour in the afternoon. On the morning of 1 January, the baby was "normal". She did not know if anything had happened to the baby in the morning after her husband had left. When YL had left to go to the shop with the baby, there had been "no problem". The baby had been just the same when the appellant had collected her. YL could not remember if the baby had been unwell on 31 December or 1 January. She had previously been to the doctor. When referred to her police statement, YL said that the baby had been a slower developer than her older sister. She had been unable sit up unassisted for longer than 10 minutes. She had been sick on 1 January. She had had a cold and a chest infection. She was not normally sick after feeding. She normally held her bottle with both hands. A photograph of the baby, which had been taken by the appellant on 1 January, unusually showed her feeding with her hands at her side. YL did not leave the baby with her other daughter as she could hurt the baby. Ms Leung had told her that her older daughter disliked the baby. In his speech, the advocate depute had described YL's evidence

as being that the baby had been happy and alert in the morning of 1 January and when she had been picked up by the appellant.

[10] Ms Leung testified that she occasionally babysat GN between 3.00pm and 9.00pm. The baby normally slept for an hour or two during this period. According to the appellant, Ms Leung had said that the baby's sister could be rough when handling the baby. She would hold the baby's head and pull and push it sideways. This happened on most days, including 31 December. She had warned the baby's parents about this. The advocate depute referred to her evidence being that, on 31 December, when she had seen the baby being dropped off, the baby seemed "okay" and her "usual happy self".

[11] The appellant's husband, namely Abdul Malek, had returned the baby to her parents on the evening of 31 December. The baby seemed odd. She was not her normal self. She was crying and had a rash on her face. The advocate depute told the jury that this witness had said that he had thought that, on 31 December, the baby had been coming down with a cold, but he did not mention that to his wife. When pressed, he had not thought that there was anything wrong with the baby.

[12] According to the baby's GP, she had had not suffered any serious illnesses. Her development had been normal. She was meeting all the milestones.

[13] The baby's injuries were reviewed by two experts from England, namely: Mr Peter Richards, a retired paediatric neurosurgeon; and Mr William Newman, a consultant paediatric and neuro-ophthalmologist. The trial judge quoted from Mr Richards' report, when directing the jury on his evidence as part of the Crown case, as follows:

> "There is nothing to suggest any delayed deterioration following her head injury. Rarely, patients after apparently minor head injury can get progressively worse so that what was originally thought to be a minor head injury turns into a serious, perhaps even fatal one. The usual cause is a large blood clot in the head which as it grows compresses the brain further and causes damage. No such cause was

> apparent in this case. In such cases the period between the injury and loss of consciousness due to the secondary effect is known as a 'lucid interval'. However, in lucid interval cases there is normally a gradual drift towards coma and it is for this reason that head injuries are admitted to hospital for observation so that if they deteriorate something can be done about it. Lucid interval cases show some of the effects of head injury, including irritability, nausea and headache and then gradual deterioration before things become critical. They do not go from complete normality to critically unwell. This would indicate, on the basis of all descriptions of [G] being normal and feeding normally until her acute deterioration, that the point of injury was the point of acute deterioration."

[14] Mr Newman's report of 28 January 2019 was also quoted by the trial judge as follows:

> "In the absence of an identifiable medical condition or history of significant trauma the retinal haemorrhages identified in [G] remain unexplained but would be most consistent with those found following a shaking type injury likely having occurred at or around the time she became unwell on 1st January 2017."

[15] The appellant, who was 26 at the time of the incident, gave evidence. She denied shaking the baby. She had looked after her on four successive days. The advocate depute maintained to the jury that her consistent position had been that there had been nothing wrong with the baby, including when she had picked her up. When she returned home, the baby had taken a feed of 20 ounces. Her temperature was normal and she had no concerns about her. According to the appellant, she had testified that the baby had been sleeping when she had collected her on 1 January. She had had to wake her up to feed her. She was still sleeping when the appellant got home at 5.00pm. She took less than half a bottle, which was not normal. She had taken the photograph of the baby, who was not holding onto her bottle as she normally did.

[16] The baby had gone back to sleep and awoke about 8.30. The appellant gave her another bottle, but she could not recollect if she had finished it. She had played with the baby, who had given her an "on off smile". She had put the baby onto a play mat and she

had fallen to her right. She had not seen her fall before. She put down pillows and soft toys for her. She went into the bedroom to attend to her own daughter. When she returned, the baby had fallen onto her right side again. She picked her up. Her hands and feet were floppy and she was struggling to breathe. She had been concerned that the baby's hands and feet were really cold (the advocate depute did not accept that this had been her position in evidence). She had not reported the existence of any concerns to Ms Leung, when she had arrived with the baby's parents, or to the police, when they had arrived.

The experts in more detail

Mr Richards

[17] When Mr Richards had been giving his evidence, by live link from England, the jury had copies of his 24 page report to assist them in following his testimony. The report referred to the information which he had been given, including a transcript of the appellant's police interview and various statements from the ambulance staff and the baby's health visitor. It repeated what had been noted in the medical records following the baby's arrival at hospital. It covered the results of the CT and MRI scans and many other investigations which had been carried out in the hospital. Mr Richards was taken through all of this in considerable detail in examination in chief.

[18] Fresh blood had been found on the baby's brain (subdural haematoma), which was no more than ten days old but could have been only ten seconds old. It was a marker for what the problem had been. The tests had been done to see if there was anything, other than a head injury, which might have caused the presence of fluid. No diseases had been found. The tests could not eliminate unknown causes, but they did eliminate the known ones. The only positive things that had been found were:

> "things in the brain and the eyes that shouldn't be there and no explanation for them being there, and in the absence of these things being there they're all known to be associated with a recent head injury. So that would be my working diagnosis, a recent head injury.
>
> …Or something completely unknown. Or something completely unknown… but… for practical purposes this was a head injury."

There were five factors: sudden onset encephalopathy; subdural bleeding; subarachnoid bleeding; retinal haemorrhages; and traumatic effusion. All were consistent with a head injury. There was no other explanation. There was a theoretical unknown, which could not be discounted, but doctors had known about head injuries and diseases for centuries so it was unlikely to have been the cause. The features were consistent, in the absence of any evidence of specific trauma, with what was known as "shaken baby syndrome", occurring as a result of a momentary loss of control on the part of the carer. There was nothing plausible, which had been "put forward and accepted by mainstream medical opinion to explain the features similar to [G's] presentation other than injury".

[19] In relation to the level of force involved, Mr Richards said:

> "…[W]e can see these types of injuries in car crashes, it doesn't mean the forces are exactly the same because cars, in injury terms, crash slowly, their bonnets crumple and things. Whereas in theory a shaking is fast. But we do see them in those sorts of things. We do see similar things in children who fall down stairs with carers, or out of windows with carers. We don't see them in children who fall out of domestic beds, for example, or sofas, a minor domestic trauma, as I would call it. So the force must be somewhere between the two. It is thought, but not proved, but widely accepted amongst mainstream doctors, who look after infants like this, that the kind of force is such that a witness would say "stop, don't do that, you'll hurt the child."

Throwing a baby up and catching her in the course of normal play would not cause this. If it did, then the child would become immediately unwell. A "low level topple" would not cause it either.

[20] Mr Richards continued:

> "It's a cardinal feature of any head injury… that there is a change at the moment of head injury. At its most mildest, if you bang your head on the cupboard door you go 'ow' at the moment you bang your head. You're not fine for ten minutes and suddenly go 'ow' … Whenever there is a head injury there is a change, if it's so severe you go unconscious straight away, if it's mild you may not be unconscious but there's still… a change, you know, there'll be pain. Subarachnoid blood causes pain, they'll not be feeling right. So if, as described, there was normality and it's dependent upon an accurate picture from the carer, but if there's normality and playing and laughing and crying and interacting, giggling and interacting after this play, I don't believe that injury could have occurred… But as described to me, when the childminder left there were no concerns and when they came back, the child was collapsed. So if that's correct… the clinical change is likely to be the point of injury.
>
> … If this was a lucid interval case, I would think it's likely that there would have been concerns, something is not right, the baby is not feeding, they're vomiting, they're just really sleepy, they're not playing, they're not interacting, which is not the story I was given when I wrote this report. So I don't think it … and also, there's no big blood clot, no reason for a lucid interval in the imaging and so forth."

[21] In cross-examination, Mr Richards was referred to the relatively recent discovery that, contrary to previous thinking, many babies have subdural bleeding at birth. Various propositions were put to Mr Richards, including that the nature of the baby's birth may have been a contributing factor to what happened and the baby's parents had thought that she had been developmentally slow. He accepted that his opinion might change, if the history which he had been given had not been accurate. He would have been concerned if there had been a radical change in a baby's feeding pattern or the baby was not holding her bottle as she normally did or the baby had been repeatedly "impressively sick". Cold feet in an otherwise normal baby would not be a cause for worry. Cold peripheries in a collapsed baby were different. If some of the retinal haemorrhages were older than the others, it was possible that the baby had been shaken more than once. That might explain why her development was thought to be slow. The clinical signs in this case had all been fresh, recent and not caused weeks beforehand. The situation in which the baby's head had previously been seized and shaken was put to Mr Richards, but he said that that still left the

collapse on the day. He accepted that, if the account which he had been given had been wrong, and the baby had not been right during the day, then that was a "different ballgame". If the account given by the parents could not be relied upon, the prior picture would not be there. If an eight year old had been using a baby bouncer as a catapult, that could have caused the injuries, but, in that event, significant change at the time would have been expected.

[22] In re-examination, Mr Richard again accepted that his view might change if the history which he had been given had been "totally wrong". He continued:

> "If… it is established and the court accepts that a couple of minutes before the collapse, the baby had fed, was interacting normally, seemed fine, you know, nothing causing any concern, was left for a few moments and then collapsed, I do not think that any earlier events could have done this. If it comes out that actually this was an unwell baby through the day and getting worse and didn't feed just before they became unwell, that's a different story. But if the story… ends up being similar to what… was presented to me in the papers which I was sent then I remain firmly of the opinion that I have given."

Mr Newman

[23] Mr Newman also gave his evidence by video link from England. His report, which ran to some 61 pages, was distributed to the jury. He was taken through it in considerable detail by the advocate depute, especially in relation to the hospital's ophthalmic specialist's clinical findings and the retinal photography. Mr Newman referred to the need, in cases such as GN, to ask a specialist to take a look at the back of the eyes. When that was done on 4 January 2017, extensive haemorrhages were found throughout the whole of the back of both eyes and on different layers of the retina. There was no history of any naturally occurring disorder, underlying medical condition or disclosed history of trauma which could have explained the findings. In these circumstances, these types of haemorrhages were what were seen following a shaking type injury. They were most consistent with that

having occurred. The shaking would have happened around the time that the baby became acutely unwell. Whatever caused the haemorrhages would have caused a change in her visual behaviour. She had also suffered a hypoxic-ischemic injury, which was specifically in the area of vision. If that had occurred at the same time, it would have been clear to a parent that there was a problem with her vision.

[24] There was vast experience of children's eyes being looked at, from 24 weeks premature onwards, to see if minor falls could cause retinal haemorrhages. There was a potential gap in medical knowledge because not every child, who is brought into A & E or who has fallen off a sofa, has a retinal scan. However, Mr Newman and his colleagues each saw between 20 and 60 children, who were under the age of one year, three or four times every week. They did not find haemorrhaging unless there was an explanation. Most of the gap had been filled by both clinical experience and systematic reviews by senior clinicians. Haemorrhaging could be caused at birth, but even traumatic haemorrhaging would have resolved within two to three weeks. If the baby had had haemorrhages which had persisted for eight months, she would have had very abnormal visual behaviour, which someone would have noticed. It was not possible to time the haemorrhaging or to state whether it was all caused on one occasion. In conclusion, it was very unlikely that accidental trauma, of a type which would normally occur at home, or falling from a sitting position, would result in the baby's haemorrhages. Although accidental trauma did cause retinal haemorrhaging, it would be exceptional to find that which had been found. It could not be caused in normal handling or play.

[25] Tests had eliminated known natural causes, each of which was considered in some depth in the examination in chief. In relation to unexplained medical conditions, Mr Newman said:

> "Well this is simply keeping an open mind of the fact that not everything in medicine can be explained. So we have situations where we have a particular set of clinical features which defy explanation at this particular time. But maybe later we'll find an explanation, either because of genetics or other testing. So one has to keep an open mind there may be other explanations present for which we, as yet, do not know about…
>
> …I don't think that it's more than a theoretical possibility. [GN] has been extensively investigated, clearly you don't know what you don't know… One has to interpret in the light of known neuroradiology, surgical opinion et cetera…".

He later continued:

> "… I've been through differential diagnosis and… I've not found any cause for retinal haemorrhages. … [T]hey're not related to birth, the fitting, any vomiting, raised pressure… minor trauma, immunisations or a fall from a sitting position. She has been extensively examined and not found to have any underlying medical condition. And to date I've not found any history or clinical examination… of the eye to suggest an inherited or born-with abnormality. My conclusion is in the absence of a disclosed history of accidental trauma… the haemorrhages remain unexplained [and] are in my opinion most consistent with that that we see following a shaking type injury. I've described how I think that type of shaking type injury might occur and that picking up a child and shaking a child in that manner for a short period of time… would likely to be sufficient to generate the retinal haemorrhages. And such behaviour… would be abnormal and obvious to an independent bystander and the perpetrator that they were doing something that they shouldn't be."

[26] Cross-examination focussed on the dependence on an accurate history and the fact that a perpetrator would not want to be truthful or would claim that they could not remember how the baby was acting. There had been no comment on visual activity in the period after the baby's admission to hospital until 4 January. From a purely ophthalmic outlook, the haemorrhages could have been caused on 30 or 31 December 2016 and they could have been caused on more than one occasion. However, the haemorrhages would result in a change in visual behaviour and the brain injury would cause an even greater change. The baby's method of holding a bottle or the fact she fell over did not indicate a visual problem.

Speeches and charge

Crown

[27] The advocate depute's approach focused on the evidence that the injury which the baby had suffered would have had an immediate and obvious impact on her. If that was correct, there was only one person who could have assaulted her. He founded heavily upon the evidence of the two independent experts, which he said pointed to the inevitable conclusion that the appellant had been responsible for the "shaking injury".

Defence

[28] Early on in the defence speech, which was of considerable length, there was reference to the moveable feast of changing medical knowledge, especially in relation to the extent of retinal haemorrhaging at birth. The appellant's previous good character as a kind, gentle parent was prayed in aid. There were no outward signs of trauma. The photograph of the baby, which the appellant had sent to her sister at just after 9.00pm, offered no explanation as to why the appellant would suffer a sudden loss of control. The defence founded on the consistency of the appellant's story that there had been nothing wrong with the baby earlier that evening. That consistency was to be contrasted with the evidence of the baby's parents, who had said 488 times: "I can't remember". One question was why there had been no investigation into their changing accounts. They had lied by omission and the jury ought to ask themselves why they were lying.

[29] The innuendo was that the baby's father's account to the police suggested that the baby had been "getting on his nerves". There was an attack on the father in relation to him saying "no comment", when he had been interviewed as a suspect and asked what his

thoughts were on the disciplining of children. There was criticism of both parents being "reliant on all sorts of babysitting arrangements" and the absence of evidence from the eight year old daughter. The father was said not to have looked upset at the hospital. His "baby was not his main priority that night, his priority was getting a story straight… to protect himself". "His reaction in court did not impress as someone who was a caring vigilant attentive father".

[30] The mother was attacked for saying that the birth of GN had been without complications when there had been an emergency caesarean section. Conflicts with what was in her statement to the police, when she was interviewed as a suspect, were highlighted. This was designed to discredit the evidence of the parents that the child had been happy before being picked up by the appellant. There were repeated references in the speech to the "can't remember replies". The baby's mother's attitude was described as "totally cavalier" in relation to a previous episode when the baby had to be taken to hospital.

[31] The defence turned to the evidence of Ms Leung about the baby's 8 year old sister's handling of her. She seemed to "hold [her] head and shake it… most days". Ms Leung had told the baby's parents but, according to the defence speech, the parents did not seem to have done anything about this. The speech continued:

> "I suggest to you the only people who spoke with any real warmth and affection to [G], unbelievably…was [Miss Leung] and [the appellant].
>
> [The appellant's] account of what happened at the point [G] became unwell, I say to you hasn't changed from the first moment the [G] became… unwell. Despite… bullying from the police. It seemed to swing between bullying and then entreaties to just tell us it was an accident. To which she maintained, "I did not do it, I did not harm her, I'm trying to help you".

The defence maintained that there were double standards. There was evidence pointing away from the appellant which the Crown had swept under the carpet.

[32] In relation to the two experts, the defence approach was to suggest that they had been given the wrong information or "a fraction of the whole story". It was explained that, although the jury had Mr Richards' report, they did not have his cross-examination or re-examination, "so don't think that the report was all he said". The appellant covered those parts of Mr Richards' testimony which might have been regarded as favourable to the defence. The first was that he had accepted that he had relied on the information which he had been given, including the normal nature of the baby's birth and that she had been happy, alert and interacting when handed over to the appellant. These elements had "gone". When Mr Richards had spoken of the fresh blood in the haemorrhaging, as he described it in his report, he had said in his evidence that it might have been ten days old. Although he had said that one forceful shake could have caused the injuries, no-one knew for certain. The problem was that Mr Richards' opinion depended on the accuracy of the parents' account of normality and they could not be relied upon. There was evidence that the baby was sleeping too much, had been sick and had freezing feet and hands. Neither expert could rule out the occurrence of two episodes. They accepted that the injuries could have been caused by another child.

[33] On Mr Newman, the appellant stressed that retinal haemorrhages could not be accurately timed. In all of this, the appellant told the jury that they had to be more careful than in the normal case because:

> "…we just don't know. There is no black and white. These cases confuse lawyers and doctors, they get argued about up and down the country…".

Charge

[34] The judge's charge was relatively succinct. He gave the standard directions on the jury's function in relation to evidence; that it was the jury's task to decide what evidence to

accept. It was the jury's recollection of the evidence which counted. If the jury believed the evidence of the appellant, which absolved her from guilt, or they had a reasonable doubt about it, the jury had to acquit. The judge turned to the experts, whose evidence of opinion was admissible because of their specialist knowledge. He continued:

> "Since the opinion of an expert witness is based on a certain set of facts, it is of no value unless those facts are proved. It can sometimes happen, that an expert witness forms a view before the trial based on alleged facts presented to him at the time, such as witness statements, which, in the course of the trial are not proved, or may even be contradicted. If that happens, the foundation on which the opinion was based has disappeared and the opinion becomes of no value.
>
> Moreover, in one sense, you the jury have an advantage over any expert witness in that you have heard all the factual evidence in this case, particularly the evidence of the parents of baby [G] and of the accused. And you are able to assess any expert evidence in light of the whole facts which you find have been proved."

[35] The trial judge explained that, whereas in some cases there were competing opinions, there was no dispute between the experts in this case, although it was still up to the jury to decide whether to accept that evidence. The judge said:

> "In this case, you are dependent upon the evidence of the relevant medical experts for proof that baby [G] was assaulted and that it was the [appellant] who assaulted her. So, you could not convict unless you accepted the evidence of the relevant medical experts, to which I shall refer briefly, later on".

[36] The judge dealt with other matters before describing, first, the Crown case as follows:

> "There are really, you may think, three chapters of evidence that you have to look at. First of all, what was [G]'s condition up until she took seriously ill after 9.00pm on Sunday 1st January 2017. Was it, as the Crown say, that she was behaving normally, or was it not?
>
> Secondly, what was her condition after she took seriously ill…
>
> And the third chapter is, what caused [G] to become seriously ill. In particular, have the Crown proved that it was an assault by shaking on the part of the accused".

[37] In relation to the first chapter, the judge mentioned the evidence that the baby had not suffered from any serious illnesses in the past. He referred to the parents' testimony and to the appellant's statement in her police interview (*supra*), from which he quoted, to the effect that the baby had been "fine". On that basis, the jury could find that the baby was behaving normally up until the point at which she became seriously ill. The judge continued:

> "The real question is, in the third chapter, what caused [GN] to become seriously ill. That's the crux of the case. Have the Crown proved that it was an assault on the part of the accused?"

The jury were reliant on the medical evidence on this; the two experts and the doctors who spoke to the joint report.

[38] The trial judge read out the conclusions of the two experts as set out in their reports (*supra*) and said:

> "Well, … do you accept these opinions as expressed by the doctors and in light of the cross-examination of them by [counsel for the appellant]? It is only if you do accept their opinion that these were shaking injuries caused at the time of acute deterioration and are satisfied that the shaking amounted to an assault that you could convict the accused, but that, in a nutshell, is the Crown case. It relies principally on the evidence of Mr Richards and Mr Newman, and has some support from the other treating doctors."

[39] The trial judge turned to the defence case. This pointed to the appellant's previous good character. It was not for the appellant to prove how the baby had come by her injuries. The appellant had engaged in a broad challenge to the credibility and reliability of the baby's parents. The judge asked the jury to consider what the purpose of that had been. If it was to demonstrate that the baby had some form of underlying condition, the experts had not accepted that. The appellant in her police interview and her testimony had said that the

baby had been fine until she became seriously ill. If the parents were being accused, then no incrimination had been lodged to suggest that they, or anyone else, had been to blame.

Submissions

The appellant

[40] The appellant submitted that each of the four grounds of appeal (*supra* para [1]) were interlinked. It was accepted at the outset that the circumstances differed from those in *Liehne* v *HM Advocate* 2011 SCCR 419 in that there were no competing medical opinions. The defence had been that the child had not been well when handed over to her. Medical science was changing and there was a real possibility that something unknown had caused the injuries (*ibid* at para [49]). *Younas* v *HM Advocate* 2015 JC 180 was distinguishable as there the dispute was on fact and not opinion. The judge ought to have provided the jury with a route to verdict (*Hainey* v *HM Advocate* 2014 JC 33 at para [52] citing *R* v *Henderson (Practice Note)* [2010] 2 Cr App R 24).

[41] The case was unusual in that there were no physically observable injuries. The Crown case had been based on the evidence of the two experts, which had been complex. The jury had been provided with copies of their reports, which the advocate depute felt obliged to go through with them. The trial judge had referred to the reports in his directions to the jury. That was not a criticism, but he had gone on to say that the position of both parties had been that the child had been fine. He had referred to the appellant's police statement but had not made any mention of the qualifications to it in her testimony. He did not direct the jury that they had to take into account the contrary evidence which she had given; that the baby had slept more than had been normal and had not held her bottle as she had done previously. The child had not sat up properly. The evidence of the parents, which

often consisted of a failure to remember, had not been covered in the charge. The judge ought to have directed the jury that, if they held that the baby had not been behaving normally when handed into the appellant's care, they would have to exclude the possibility of a prior assault.

[42] The trial judge had given the jury no indication about the differences between the experts' reports and their testimony. The jury had not been given assistance on what to do with the major criticisms which had been made of the experts' view. Although they had maintained that the collapse had occurred immediately after the catastrophic event, neither could rule out that there had been some cause of which medical science was unaware. This had been a live issue, but it had not been mentioned by the judge. There was a real possibility of this. Where the evidence was complex, the judge required to assist the jury. The problem was that the jury had been left with bits of paper, rather than relying on their recollection. As distinct from testimony, they could read and re-read the reports. The judge should have made sure that the jury were not just doing this but were considering the other evidence.

[43] There had been evidence that the baby had not been well before her collapse. There was the temperature of her extremities. There was evidence of how she had been handled by her sister. The evidence of the parents had been difficult. In order to get to the point at which they said that the baby had been "fine", they had to be referred to their statements to the police. The judge had not directed the jury on these matters. The judge's criticism of the lack of an incrimination was misplaced. An incrimination was not appropriate as there had been no direct evidence that anyone else had caused the injuries. The defence was that, if there had been an assault, it had not been by the appellant. Therefore it must have been the

parents or the sister. The judge had confined himself to saying that the evidence had been that the child had been "fine".

[44] It was unusual for complex medical reports to be given to juries for their retention. There was a danger of the jury concentrating on what had been given to them. The expert testimony could have been given with the reports being displayed on a viewer, rather than being distributed. The reports contained references to hearsay which did not properly reflect the testimony of the witnesses. There was a risk that the jury would have concentrated unduly on the written summaries of the witness statements, which were contained in the reports, rather than what had been said in court. Similarly, they would have concentrated on the quotations from the appellant's police interview, rather than her testimony.

The respondent

[45] The advocate depute maintained that the extent of the duty on the trial judge to address the evidence in his charge was primarily a matter for his or her discretion in the context of the particular trial (*Ramzan* v *HM Advocate* [2015] HCJAC 9 at para [35]. There had been no controversy about the medical evidence in this case (cf *Liehne* v *HM Advocate* (*supra*) and *Hainey* v *HM Advocate* (*supra*)). The defence was that the factual basis for the opinions had been incorrect. It was for the judge's discretion to decide how to deal with it (*Younas* v *HM Advocate* (*supra*) at para [56]). The trial judge had set out the expert evidence clearly and had provided a route to verdict under reference to his three chapters. The Rumsfeldian[1] analysis on the difference between an unknown unknown and, as in *Liehne*, a known unknown, pointed to the former being theoretical at best. The judge's charge was

[1] US Secretary of Defense Donald Rumsfield's news briefing on Iraq dated 12 February 2002

consistent with the approach that a jury must reach a decision on the current state of knowledge. Considering how matters might develop in the future was speculation (see Jury Manual: *Skilled Witnesses and Expert Evidence* page 36.4; *Carroll* v *HM Advocate* [2015] HCJAC 75 at para [19]). The experts had been extensively cross-examined and their evidence had been referred to throughout the speeches. The jury would have been clear about the live issues.

[46] It was accepted that the jury would have had to have been directed to exclude any realistic possibility of an unknown cause. There was no contention that there was any natural explanation or that there was a non-accidental cause. The focus was on timing. The defence had not said that there had been an unknown cause. There had been evidence of a series of intensive tests and assessments, which had been carried out to exclude other possibilities. The experts had concluded that the injuries had been caused by shaking. There was a cogent body of evidence from which the jury could exclude other causes and hold that shaking was the cause (*Smith* v *HM Advocate* 2017 JC 54 at paras [34-38]). There was no realistic possibility of an unknown cause and no direction on that was required. The difficulty for the defence was the appellant's consistent position that the baby was fine. The judge required to tailor his charge to the live issues (*Lauder* v *HM Advocate* [2016] HCJAC 30 at para [13]; *Elshirkisi* v *HM Advocate* 2011 SCCR 735 at para [13]; *Fenton* v *HM Advocate* 2014 SCCR 489 paras [6] and [11]; and *Sim* v *HM Advocate* 2016 JC 174 at para [32]). The judge was not bound to direct on the possibility of another assailant when there was no evidence of this.

[47] The experts had given evidence by live link. Using the viewer and creating a split screen for the jury would have resulted in the jury not being able to follow the report as the letters would have been too small to read. The reports had correctly set out the information

upon which the experts' opinions had been based. Neither made any material qualification to his opinion during his evidence. The status of the factual basis of the opinions was made clear by the trial judge. It would have been clear to the jury that they had not only the reports but also the testimony of the experts. There was no basis for supposing that the jury would focus on the written reports and not the whole evidence of the witnesses. There was no material in the reports which was calculated to prevent a fair trial (cf *Grant* v *HM Advocate* 1938 JC 7 at 10). The fact that the jury had copies of the reports would have had no bearing on the outcome of the trial (*Gilroy* v *HM Advocate* 2013 JC 163 at para [65]).

Decision

[48] In several recent cases, including *D'Arcy* v *HM Advocate* [2013] HCJAC 173 (at para [14]), R*amzan* v *HM Advocate* [2015] HCJAC 9 (at para [30] and *Younas* v *HM Advocate* 2015 JC 180 (at para [55]), the court has explained that there is no requirement on a judge to rehearse the evidence in the case. It is primarily for the parties to address the jury on what parts of the evidence they maintain are, or are not, significant and to make submissions on credibility and reliability, where appropriate. The trial judge may elect to comment on certain aspects of the speeches, but he or she does not "require to conduct an independent audit of the evidence in order to extract all the main points which he considers might be regarded by the jury as favouring one verdict or another" (*Younas*, LJC (Carloway), delivering the opinion of the court, at para [56]). It is true that the judge requires to charge the jury in such a manner that will make the jury's verdict intelligible. The provision of a specific route to verdict will be desirable in order to achieve this. For example, in cases where there has been competing expert evidence of a complex technical nature, the judge may require to give the jury some guidance on how to approach that evidence; to provide a

"framework which allows them to proceed to a verdict by a reasoned process" (eg *Liehne* v *HM Advocate* 2011 SCCR 419, LJG (Hamilton) at para [47]). In less complex cases, the route to verdict will be relatively self-evident.

[49] This was not a complex case. There was no competing expert evidence. The evidence of the two experts was, if not straightforward, easy to understand. Complexity is not to be gauged purely by reference to the time which it took for the experts to be examined or cross-examined. It is analysed by reference to what the experts actually said. In this case, the summary which the trial judge repeated to the jury from the conclusion sections of the two reports amply outlined the experts' positions. In Mr Richards' opinion, since there was no natural disease or history of trauma to explain the injuries, and the baby was reported as behaving normally up until the point of acute deterioration, the injury was caused at that point. This was not a lucid interval situation because that would have involved a gradual deterioration and not a sudden critical decline. Mr Newlands' view was that, "in the absence of an identifiable medical condition or history of significant trauma the retinal haemorrhages… would be most consistent with those found following a shaking type injury likely having occurred at or around the time [the baby] became unwell". Both experts reached the same conclusion having regard to their knowledge in their own particular specialisms.

[50] There was no significant departure by either expert from their conclusions in the course of their testimony. It was, of course, an important factor in reaching that conclusion that the accounts of the baby's condition in the hours before the collapse were that she had been behaving normally. Each expert accepted that, if there had been a body of evidence which demonstrated that the baby had been in some form of decline, that might make a difference. The trial judge gave the jury clear directions on this. As quoted above, he

explained that sometimes the facts upon which an expert had expressed an opinion turned out not to be correct. In that event "the foundation on which the opinion was based has disappeared and the opinion becomes of no value". The judge could hardly have been clearer.

[51] Having said that, the trial judge directed the jury that, for a conviction, the jury were "dependent upon the evidence of the relevant medical experts". The judge provided a clear route to verdict. For a conviction, the jury had to accept the evidence of the experts and that depended upon the jury finding that, as the appellant's parents, and the appellant herself at police interview, had said, the baby was "fine" before she came into her care. The judge had already directed the jury that, if they accepted the appellant's evidence, that she had not shaken the baby, or had a reasonable doubt about it, they required to acquit. It follows that, if a conviction resulted, the jury must have accepted the evidence that the baby had been fine before coming into the appellant's care and thus rejected the suggestions, based upon somewhat flimsy foundations that the baby was in some way deteriorating or was otherwise unwell. They must have accepted the fundamentals of the experts' opinions and rejected the appellant's version of events, as given in the witness box, that, *inter alia*, she had not shaken the baby.

[52] There was no requirement to give the jury a direction concerning the theoretical possibility that some time in the future medical science might uncover another cause of the haemorrhages. There are references in both *Liehne* v *HM Advocate* (*supra*, LJG (Hamilton) at para [48]) and *Hainey* v *HM Advocate* 2014 JC 33 (Lord Clarke at para [52]) to *R* v *Henderson (Practice Note)* [2010] 2 Cr App R 24 and the need to exclude the "realistic possibility of an unknown cause" because "today's orthodoxy may become tomorrow's outdated learning" (*R* v *Holdsworth* [2008] EWCA Crim 971, Toulson LJ at para 57 (R v *Henderson (Practice Note)*

(*supra* Moses LJ at 217). In a case such as the present, where there was clear evidence (if accepted) of the cause of the baby's injuries:

> "the jury must reach a decision on the current state of scientific knowledge, and to consider how matters might develop in future is mere speculation" (*Carroll* v *HM Advocate* [2015] HCJAC 75, Lord Drummond Young, delivering the opinion of the court, at para [19]).

The suggestion, which was developed by counsel from the general and inevitable concessions made by the experts that it was always possible that a new cause might be discovered in time, amounted to no more than speculation. As the experts both explained, this was a well-trodden area of medical practice. The jury ought not to have been distracted by the theoretical notion of an entirely new cause of haemorrhaging being found in the future.

[53] There was no requirement for the judge to give the jury a specific direction on the need to eliminate the possibility that someone else had shaken the baby some time before she had been handed over at 3.30pm, more than 5 hours before her collapse. Quite apart from the absence of any evidence that either the parents or the baby's eight year old sister had done anything to cause the child substantial injury, the essence of the case as advanced by the experts was that the injuries had been caused at the same time as the collapse. If the jury did not accept that hypothesis, which was explained in detail to them, they would have been bound to acquit. That was the only basis upon which the Crown case proceeded. In these circumstances, there was no misdirection of the jury and the first three grounds of appeal fall to be rejected.

[54] In a system which developed at a time when the copying of documents was difficult, it was unusual to provide the jury with copies of any productions other than, and even then relatively recently, photographs. Testimony would be given about the principal productions

without them ever being handed to the jury, although that might be done if a production's appearance was a relevant fact. Experts would give evidence orally without their reports being shown to a jury. Although, as a matter of fairness, they may have been disclosed to an accused's representatives, they did not require to be productions in order for the expert to testify to their content. In times when trials were much shorter, the expert could be permitted to hear the testimony about the facts before expressing his or her opinion on them (see Criminal Procedure (Scotland) Act 1995, s 267(1)). As copying became easier and cheaper, the provision of physical copies of important items to the jury became commonplace. Alternatively, more recently, the use of a viewer has enabled the jury to follow the questioning of witnesses more easily. In the modern era, with the digitisation of material, seeing the relevant document on screen may become more prevalent.

[55] Whether an expert report should be shown, or given, to a jury is a matter to be determined by the trial judge having regard to whether it will assist the jury in following the testimony of a witness or, if the report is retained by the jury or requested during their deliberations, in reaching their verdict. Whether copies of the document should be given to the jury, as distinct from being displayed on a viewer, is a question of convenience. The advocate depute has explained why that was not practical (although no doubt it was possible) in this case when the witnesses were testifying by live link. The principle of fairness will, as always, apply. Given that the advocate depute elected to trawl through the entirety of what were extensive and detailed reports, it was entirely reasonable to distribute copies of them to the jury in order to assist them in following the testimony.

[56] If a report contains material which is either inadmissible or unnecessarily prejudicial to an accused, care must be taken to excise that material from any copies of the report which are to be shown to the jury. The problem was illustrated in *Grant* v *HM Advocate* 1938 JC 7

where a doctor, who was speaking to the treatment of a child who had allegedly been poisoned, had incorporated a statement from the child's mother in his report. The report said that: "She said that her husband had done it". That is what the mother said in evidence but the statement in the report was inadmissible as hearsay. The Lord Justice Clerk (Aitchison) said (at 10):

> "A practice has been growing up in recent years of medical men putting into their reports, which are often made productions in criminal cases, statements which are made to them by third parties, and these are sometimes read to the jury when the reports are put in evidence. In some cases this may be difficult to avoid… But in all cases the utmost caution must be exercised to see that no statement which is hearsay in a medical report is disclosed to the jury if it is calculated in any way to prejudice an accused person, and especially so where there is a real issue as to whether the accused person committed the act with which he is charged…".

That *dictum* is undoubtedly sound. A statement which is otherwise inadmissible cannot be introduced by subterfuge.

[57] In this case, first, the statements which the appellant had made during her interview by the police were admissible and therefore could be referred to. Secondly, since the experts were not present in court when the witnesses of fact were giving their evidence, the only way in which their conclusions could be tested was for the jury to understand what the bases for their conclusions were in order to follow the experts' reasoning. That could only be done by the experts stating what they understood the state of the baby to have been in the hours and days before the hospital admission. It might have been better if that had been done as a straight narrative of events, rather than by attributing particular facts to identified witnesses. That too might have had difficulties in a situation in which the occurrence of these events was challenged. The evidence of the content of the witness statements as reviewed by the experts was admissible in order to understand the basis for their

conclusions. It was evidence of the information upon which these conclusions were based, rather than of the truth of the statements' content.

[58] In any event, no miscarriage of justice could have arisen in respect of the inclusion of the statements in the reports. These were, for the most part, used in the course of the examination and cross-examination of the witnesses, notably the baby's parents. The discrepancies, such as they were, between what the experts understood the position to be at the stage of preparing their reports and the evidence in court was fully explored by the appellant's counsel in the course of her speech to the jury. The trial judge gave the jury appropriate directions on hearsay statements and how they could be used. This ground of appeal accordingly fails.

[59] The appeal is refused.